UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT A. HEGHMANN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-336-P-H***
	)	
MARK FERMANIAN,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON DEFENDANT'S MOTIONS TO STRIKE AND RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Presently before the court are motions for summary judgment filed by the defendant and by the plaintiff[1] and the defendant's motions to strike the plaintiff's motion for summary judgment and the plaintiff's response to his statement of fact.[2] I grant the motions to strike and recommend that the court grant the defendant's motion for summary judgment.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

[1] Although he appears *pro se*, the plaintiff is an attorney. Plaintiff's Answer to Defendant's Affirmative Defenses and Counterclaim, etc. (Docket No. 3) ¶ 22.

[2] The defendant has also asked the court to impose sanctions on the plaintiff pursuant to Fed. R. Civ. P. 11. Defendant's Objection to Plaintiff's Motion for Summary Judgment (Docket No. 13) at [5] –[6]. Ruling on this request is reserved until the court has acted on this recommended decision.

of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Procedural Matters

The scheduling order issued in this case set a deadline of May 5, 2000 for the filing of all dispositive motions. Scheduling Order (Docket No. 4) at 2. The plaintiff's motion for partial summary judgment was filed on May 8, 2000, without a request for leave to file after the deadline. The defendant moves to strike the motion as untimely. Defendant's Motion to Strike Plaintiff's Motion for Summary Judgment for Untimeliness, etc. (Docket No. 15). In response, the plaintiff states that he put the motion in the mail on May 5, 2000 and that the defendant has an "advantage" over him because

his counsel has an office within walking distance of the courthouse. Plaintiff's Memorandum in Response to Defendant's Motions (Docket No. 24) at 1-2. The plaintiff must have been aware that mailing his motion on the date it was due could not result in its delivery to the court on that day. If he was objectively unable to file his motion by the May 5th deadline, it was incumbent upon him to seek an enlargement of that deadline from the court prior to its expiration. He did not do so, and even now offers no reasonable explanation for his failure to comply with the court's order. The defendant's motion is granted; the plaintiff's motion for partial summary judgment and its accompanying statement of material facts are stricken.

The defendant also moves to strike the affidavit and response to his statement of material facts filed by the plaintiff in opposition to his motion for summary judgment on the grounds that they were untimely filed and fail to comply with Fed. R. Civ. P. 56(e) and this court's Local Rule 56(c). Reply to and Motions to Strike Filings of Robert E. Heghmann, etc. (Docket No. 20) at [1]-[3]. The plaintiff filed no objection to the defendant's motion for summary judgment as required by this court's Local Rule 7(b). He did file documents entitled Affidavit of Robert A. Heghmann in Opposition to Defendant's Motion for Summary Judgment (Docket No. 18) and Plaintiff's Response to Defendant's Statement of Facts under Local Rule 56(B) [sic] ("Responsive SMF") (Docket No. 17). Even if these documents could generously be construed to constitute the opposition "incorporating a memorandum of law" that is required by Rule 7(b), they were filed well beyond the deadline established by Rule 7(b) for a response.[3] The plaintiff made no request for an enlargement of time in which to file his opposition to the motion. Under these circumstances, the plaintiff is deemed to have waived objection to the motion. Local Rule 7(b). In addition, the affidavit is not made on personal knowledge as

[3] The plaintiff first filed a memorandum of law with citations to authorities addressing the substance of the defendant's summary judgment motion on June 12, 2000. Docket No. 24. By no stretch of the imagination can this filing be considered a timely objection to the defendant's motion, filed on May 5, 2000.

required by Fed. R. Civ. P. 56(e). It includes hearsay and speculation obviously not within the plaintiff's personal knowledge. Further, the plaintiff's responsive statement of material facts fails to comply with Local Rule 56(e), which requires each denial or qualification of a specific numbered paragraph in the moving party's statement of material facts to be supported by a citation to the record. No such citations appear in the plaintiff's responsive statement. For all of these reasons, the defendant's motion is granted and the plaintiff's affidavit and his responsive statement of material facts (Docket Nos. 17 & 18) are stricken. The facts presented in the defendant's statement of material facts (Docket No. 8), to the extent that they are appropriately supported by record references, are deemed admitted. Local Rule 56(e).

III. Factual Background

The plaintiff was the defendant's tenant with respect to property in York, Maine. Affidavit of Mark Fermanian in Support of Defendant's Motion for Summary Judgment ("Defendant's Aff.") (Docket No. 12) ¶ 2. When the plaintiff moved out of the property, he left the premises full of dog hair, saturated with dog odor, and with torn carpets and damaged furniture. *Id.* ¶ 3. The property required extensive cleaning and carpet and furniture had to be replaced. *Id.* ¶ 4. The defendant filed a small claims action in the Maine District Court seeking to recover for the substantial damages the plaintiff had caused. *Id.* ¶ 5. This was the first small claims action the defendant had ever filed. *Id.* His damages include unpaid rent and utilities, cleaning costs, and the costs of carpet replacement, new light fixtures and an entertainment center, which, after deducting the plaintiff's security deposit, prepaid last month's rent and a $1,000 payment, total $3,943.21. *Id.* ¶ 8.

The plaintiff filed this action on November 5, 1999 alleging that Maine's small claims procedures violate the federal Constitution's guarantees of due process and equal protection of the law

and asserting a claim for abuse of process and malicious prosecution. Complaint (Docket No. 1) at 5-8.

IV. Analysis

While the plaintiff has been deemed to have waived opposition to the defendant's motion for summary judgment, the court must nonetheless consider the merits of the motion. *Redman v. FDIC*, 794 F. Supp. 20, 21-22 (D. Me. 1992).

A. The Complaint

No evidence in the summary judgment record even begins to suggest that there is any basis for the plaintiff's claims of abuse of process and malicious prosecution. The defendant, believing that the plaintiff had caused him damages within the jurisdictional limit of the Maine small claims court, 14 M.R.S.A. § 7482 ($4,500), brought an action in that court to recover those damages. Nothing in this record would allow an inference of bad faith to be drawn against the defendant. *See Tanguay v. Asen*, 722 A.2d 49, 50 (Me. 1998) (elements of abuse-of-process claim are that defendant initiated a court process in a manner not proper in the regular conduct of proceedings with existence of ulterior motive and resulting in damage to plaintiff); *Palmer Dev. Corp. v. Gordon*, 723 A.2d 881, 883 (Me. 1999) (malicious prosecution exists where one initiates civil proceedings without probable cause with primary purpose other than securing proper adjudication of claim and proceedings have terminated in favor of person against whom brought). "Regular use of process, such as filing a law suit, cannot constitute abuse, even if a decision to act or a decision not to act, was influenced by a wrongful motive." *Tanguay*, 722 A.2d at 50. By the complaint's own terms, the small claims action brought by the defendant has not terminated in the plaintiff's favor. Complaint ¶¶ 2, 5. The defendant is entitled to summary judgment on Count III of the complaint.

The complaint alleges in Counts I and II that Maine's small claims court procedures are unconstitutional because a small claims defendant "is forced to give up his or her right to a jury trial," there is no provision for "early transfer" to the Superior Court, the right to appeal and to a jury trial *de novo* is conditioned upon the payment of a $120 filing fee and a $300 jury fee, and "[p]rior to the Appeal, the defendant is exposed to the possibility of civil arrest upon the filing of the affidavit of the plaintiff." Complaint ¶ 7 (underline in original). The complaint alleges violations only of the federal Constitution, specifically of the guarantees of due process and equal protection under the Fifth and Fourteenth Amendments, not of the Maine Constitution. *Id*. ¶ 4. The Maine Law Court ruled in *Ela v. Pelletier*, 495 A.2d 1225, 1227 (Me. 1985), that the right to a jury trial under the Maine Constitution is preserved when a defendant in a small claims action has the right to a *de novo* jury trial in the Superior Court. That right is now codified in Rule 11 of the Maine Rules of Small Claims Procedure, a rule in effect at all times relevant here.

The plaintiff's first two contentions are factually incorrect. Rule 76C of the Maine Rules of Civil Procedure provides, in relevant part:

> Except as otherwise provided in these rules, the defendant or any other party to a civil action or proceeding in the District Court may remove that action to the Superior Court for the county in which the division of the District Court is located by filing notice of removal, serving a copy of the notice upon all other parties, and paying to the clerk of the District Court the removal and entry fee required . . . .

M. R. Civ. P. 76C(a). Nothing in the Maine Rules of Civil Procedure or the Maine Rules of Small Claims Procedure prohibits the removal of a small claims action, which is filed in the District Court, to the Superior Court by a defendant before a hearing is held. By removing the action before hearing, which obviously is "early" in the proceedings, a defendant may choose a jury trial, and its attendant procedural rules, before any significant action is taken in the small claims court. By statute, the small claims procedure is "an alternative, not an exclusive, proceeding." 14 M.R.S.A. § 7481. The plaintiff

has no federal constitutional claim based on the alleged denial of "early transfer" to a court in which a jury trial is available or on the allegation that he is "forced" to proceed without a jury trial. Even if that were not the case, the federal constitutional right to a jury trial does not apply to the states. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). The Fifth Amendment, which guarantees the rights of due process and equal protection invoked by the complaint, cannot be interpreted to provide a constitutional right to a jury trial in state courts, when the specific guarantee of that right in the Seventh Amendment does not apply to the states.

The Law Court has ruled that the $300 jury trial fee, which the defendant would have to pay if the plaintiff had brought his claim initially in Superior Court and chose not to seek trial by jury, does not violate the Maine Constitution's guarantees of due process and equal protection. *Butler v. Supreme Judicial Court*, 611 A.2d 987, 991-92 (Me. 1992). The fee may be waived upon application of an indigent party. *Id.* at 989. Assuming *arguendo* that the plaintiff may challenge the jury fee and the Superior Court filing fee under the Fifth and Fourteenth Amendments, when it is the Seventh Amendment that appears more directly applicable to the plaintiff's claim, the courts that have addressed this argument have uniformly held that a jury trial fee does not deprive litigants of their federal constitutional rights to due process, *Hamilton v. Ceasar* 578 N.E.2d 221, 223 (Ill. App. 1991); *Robertson v. Apuzzo*, 365 A.2d 824, 831 (Conn. 1976), or equal protection, *Hamilton*, 578 N.E.2d at 224; *Robertson*, 365 A.2d at 832. *See also* Michael R. Flaherty, Annotation, *Validity of Law or Rule Requiring State Court Party Who Requests Jury Trial in Civil Case to Pay Costs Associated with Jury*, 68 A.L.R.4th 343 (1989 & Supp. 1999). I find the reasoning of these courts to be persuasive. Particularly where, as here, the jury trial fee may be waived upon application of an indigent party, there is no possible violation of a party's federal constitutional rights inherent in the fact that the fee

will be charged to any defendant in a small claims action who seeks a jury trial, either upon removal or upon a request for trial *de novo* after hearing in the District Court.

The same is true of the $120 filing fee. It may also be waived for indigent parties. M. R. Civ. P. 80L(f) & 91(f). The fee is therefore consistent with the Supreme Court's holding in *Boddie v. Connecticut*, 401 U.S. 371, 380-82 (1971), that a state may not impose a filing fee upon indigent parties when that fee has the effect of precluding them from the only available means to resolve a matter affecting a fundamental relationship. As the Supreme Court noted in *United States v. Kras*, 409 U.S. 434, 445 (1973), *Boddie*'s strictures do not apply when the proceeding at issue, like the small claim at issue here, will not affect a party's "basic necessities" or materially alter his position in any constitutional sense. Accordingly, with respect to small claims cases, even the absence of an exception to the fee for indigent parties would not create a federal constitutional violation.

The final basis set forth in the complaint for the plaintiff's constitutional claims is difficult to understand. None of the plaintiff's untimely filings mentions the allegation that a small claims defendant is "exposed to the possibility of civil arrest upon the filing of the affidavit of the plaintiff" during the 30-day appeal period that follows the entry of judgment. Rule 11(a), Maine Rules of Small Claims Procedure. The booklet entitled "A Guide to Small Claims Proceedings in the Maine District Court," a copy of which is attached to the plaintiff's affidavit (Docket No. 11), refers to a civil order of arrest at page 14, but it is clear that such an order is available only if the defendant fails to appear at a disclosure hearing, which cannot even be requested until 30 days after the entry of judgment following the small claims hearing, Rule 12(a), Maine Rules of Small Claims Procedure. Obviously, the defendant is not subject to civil arrest during the period in which he can file an appeal from an adverse decision in a small claims proceeding, and no disclosure hearing can be held in the District Court after notice of appeal is filed, because the District Court is thereby divested of jurisdiction over

the matter. *Tibbetts v. Tibbetts*, 406 A.2d 78, 80 (Me. 1979). Thus, no civil order of arrest can issue from the District Court once a notice of appeal is filed.

The plaintiff's constitutional claims are without merit. The defendant is entitled to summary judgment on Counts I and II of the complaint.

B. The Counterclaim

The defendant also seeks summary judgment on his counterclaim, which seeks the same damages he sought in the small claims action (Count I), punitive damages (Count III) and sanctions under Fed. R. Civ. P. 11 (Count IV), as well as alleging breach of the lease for the premises at issue (Count II). Answer, Affirmative Defenses and Counterclaim, etc. (Docket No. 2) at 5-8. With the exception of Count IV, as to which I have already noted that the court will reserve ruling until final resolution of the matters addressed in this recommended decision, these state-law claims can only be considered permissive rather than compulsory counterclaims under the test set forth in *Iglesias v. Mutual Life Ins. Co. of New York*, 156 F.3d 237, 241-42 (1st Cir. 1998). Accordingly, if my recommendation that summary judgment be granted to the defendant on all claims in the complaint is adopted, the court will lack jurisdiction over Counts I-III of the counterclaim because they do not present on their face any independent basis for federal jurisdiction. *Id*. at 241. Accordingly, I must recommend that those counts be dismissed without prejudice.

Count IV of the counterclaim is a request for sanctions that need not be brought in a counterclaim but nonetheless meets the *Iglesias* test as a compulsory counterclaim. While its dismissal would not prohibit the defendant from requesting sanctions, allowing it to remain active for resolution after all others matters are concluded appears to be the better practice.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to all counts of the complaint, that Counts I-III of the defendant's counterclaim be **DISMISSED** without prejudice, and that this court defer resolution of Count IV of the defendant's counterclaim until such time as all other claims in this action have been finally resolved by this court.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of June, 2000.

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David M. Cohen
United States Magistrate Judge

HEGHMANN v. FERMANIAN Filed: 11/05/99
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:1343 Violation of Civil Rights

ROBERT A HEGHMANN plaintiff	ROBERT A HEGHMANN [COR LD NTC] [PRO SE] P.O. Box 2110 York Beach, ME 03910-2110
v.	
MARK FERMANIAN defendant	WILLIAM H. LEETE, JR., ESQ. [COR LD NTC]

LEETE & LEMIEUX, P.A.
95 EXCHANGE STREET
PO BOX 7740
PORTLAND, ME 04101